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IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS

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COURT OF CRIMINAL APPEALS
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MARIO ERNESTO MARTELL, **APPELLANT**

V.

THE STATE OF TEXAS **APPELLEE**

APPELLANT'S BRIEF ON PETITION FOR DISCRETIONARY REVIEW

FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS
CAUSE NUMBER 08-18-00180-CR

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STATEMENT OF THE CASE

On September 21, 1999, the Grand Jury of the County of El Paso, Texas, indicted MARIO ERNESTO MARTELL (hereinafter "Martell" or "Appellant") with Unlawful Possession of Marihuana. (CR: 7).[1] On October 6, 1999, Martell pled guilty to Possession of Marijuana > 5LBS < 50LBS and was sentenced to four (4) years community supervision under deferred adjudication. (CR: 19-21). Roughly two and a half years later, on March 4, 2002, the State of Texas filed its Motion to Adjudicate Guilt based solely on the ground that Martell failed to report to a supervision officer as directed. (CR: 28-38). The trial court heard Martell's contested revocation on January 26, 2018. (CR: 63); (RR3). After taking the matter under advisement, the trial court determined on May 31, 2018, that the allegations in the State's motion to adjudicate guilt were true and that Martell was not entitled to the due diligence defense and revoked Martell's probation. (RR4: 5). Martell timely filed his Notice of Appeal on October 10, 2018. (CR: 79).

[1] In this Brief, "CR" refers to the Clerk's Record, which is followed by page number. "RR" refers to the Reporter's Record, and is followed by the volume number, then page number. "SX" refers to the State's exhibits, also numbered. "DX" refers to Defense exhibits.

Following submission, the Eighth Court of Appeals heard oral argument on the matter on July 21, 2020.[2] On November 20, 2020, the Eighth Court of Appeals issued its ruling in a published opinion, reversing the trial court's judgment adjudicating Martell's guilt and remanding the case to the trial court with instructions to dismiss the motion to adjudicate. *See Martell v. State*, 615 S.W.3d 269, 277 (Tex. App.–El Paso 2020, pet. granted). No motion for rehearing was filed.

The State timely submitted its petition for discretionary review (PDR) for filing on December 21, 2020, and it was accepted on December 28, 2020. On March 10, 2021, this Court granted the State's PDR but did not permit oral argument.

[2] Recording of the oral argument is available online at the Eighth Court of Appeals Youtube channel: https://www.youtube.com/watch?v=8CQp_0g1FPU&t=1037s (streamed live July 21, 2020, last visited 5/7/2021).

REPLY TO SOLE GROUND FOR REVIEW

The Court of Appeals had no need to consider the theory of estoppel because it was not an applicable legal theory to the trial court's ruling on Appellant's due diligence defense. Moreover, consideration of the theory of estoppel at this stage of the proceeding would work a manifest injustice against Appellant because he did not have an adequate opportunity to develop a complete factual record with regard to that theory.

STATEMENT OF FACTS

On October 6, 1999, Mario Martell pleaded guilty to Possession of Marijuana in an amount greater than five pounds, but less than fifty pounds; subsequently, Judge Jack N. Ferguson of the 34th Impact Judicial District Court sentenced him to four (4) years deferred-adjudication community supervision. (CR: 19-21). The court explicitly allowed Martell to live in Ciudad Juarez, Mexico. (CR: 22). On his personal data sheet, Martell provided his address of Juan Escutia No. 1257, Ciudad Juarez, Chihuahua, Mexico. (CR: 24). Judge Ferguson signed Martell's terms and conditions of community supervision that same day. (CR: 23). Nowhere in his contract did Martell waive diligence based on his residency in Ciudad Juarez, Mexico. (CR: 22-24).

A year later, the State of Texas filed its Motion to Adjudicate Guilt (CR: 28-38). That same day of March 4, 2002, the court issued its *capias*. (CR: 35). In its Motion, the State alleged that Martell failed to report to his supervision officer from December of 1999 through December of 2001, and, that he failed to pay his supervision fees from December of 1999 through December of 2001. (CR: 28-35). The State did not file any amendments to the March 4th of 2002, Motion to Adjudicate. (RR3: 19).

On August 11, 2017, more than a decade later, the Sheriff executed the warrant, arrested Martell, and served him with a copy of the State's Motion to

Adjudicate. (CR: 53-54). That same day, the Jail Magistrate Court of El Paso County, Texas, appointed the Public Defender to represent Martell in his adjudication proceedings. (CR: 45). On January 26, 2018, the trial court heard Martell's contested adjudication. (CR: 63); (RR3).

At the contested adjudication, the State proceeded only on Martell's failure to report to a supervision officer as directed as a basis for adjudication, while abandoning Martell's failure to pay fines (RR3: 23). During the hearing, Adrian Aguirre ("hereinafter Aguirre"), the court liaison for the West Texas Community Supervision and Corrections Department (hereinafter "the Department"), testified from Martell's complete probation file. (RR3: 6). Aguirre confirmed Martell's last known home address and last known employment address, as Juan Escutia No. 1257, Ciudad Juarez, Chihuahua, Mexico. (RR3: 19, 22). This was the same address Martell provided on October 6, 1999, on his personal data sheet. (CR: 24) (RR3: 22). Aguirre indicated that the last time Martell reported to the Department was in November of 1999. (RR3: 16).

Aguirre also testified that in January of 2000, following Martell's failure to report in December of 1999, the Department mailed a letter to Martell's Juan Escutia address in Ciudad Juarez, Mexico. (RR3: 8). Then, again in February of 2000, because Martell did not report in January, the Department mailed another letter to Martell's Juan Escutia address in Ciudad Juarez, Mexico. (RR3: 9). It is undisputed

that in early 2000, the Department sent two international mailings to Martell. (RR3: 9). In addition, on February 15 of 2000, the department placed an international telephone call to the number Martell provided to the Department –a telephone number in Ciudad Juarez, Mexico. (RR3: 10). In that phone call to Mexico, the Department made contact with Maribel, a friend of the Martell family, however no details of the call were recorded in the file. (RR3: 13).

The Department made no additional attempts to make contact with Martell after the January and February of 2000 international mailings and international telephone calls. (RR3: 20-21). Certainly, the Department made no attempts to make contact with Martell after the *capias* issued on March 4th, 2002. (RR3: 20). In fact, Mr. Aguirre testified that it is the policy of the Department to prohibit supervision officers from making contact with probationers once a *capias* issues. (RR3: 21).

Moreover, there was no indication in the Department's file that the Sheriff's Office made any attempts to make contact with Martell after March 4th of 2002, or that any other peace officer tried to establish contact with Martell after that date. (RR3: 20). Aguirre testified that to the Department's knowledge there was no contact attempted by a Department supervision officer, a sheriff's officer, or any other peace officer with the power of arrest under a warrant. (RR3: 20). Thus, it is undisputed that the Department, the Sherriff's Office, and any other law-

enforcement agency failed to make any attempt whatsoever to contact Martell *in person* at his last known address.

Based on these facts, Martell argued that he was entitled to assert the due diligence defense pursuant to Texas Code of Criminal Procedure art. 42A.109. (RR3: 26-28, 30-32). In response, the State argued that because Martell resided in Mexico, neither the probation department nor any other local law enforcement agency or officer had any jurisdiction to attempt to make contact with him in person at his listed and last-known residence and employment address and therefore asked for a judicial exception to the statutory due-diligence defense. (RR3: 23-25, 29-30). Following testimony by Aguirre and the presentation of evidence, the trial court nonetheless seemingly validated the State's futility argument and determined the allegations in the State's motion to adjudicate guilt were true. In granting the State's motion, the trial court explained that:

> the fact that Mr. Martell had been given permission to reside in Mexico, [I don't feel that it is] in the interest of justice to allow him to use that also as a reason to bring up the due diligence was not done like it would have been done if he had been residing here in El Paso County.
>
> …
>
> So I [do] find that the allegations in the motion to adjudicate guilt [are] true, that [Martell] didn't report during that – this period of time in violation of his probation.

(RR4: 5).

On Appeal, Martell argued that the trial court "fail[ed] to properly consider Martell's affirmative defense of due diligence" and erred in determining that he was not entitled to the due-diligence affirmative defense simply because he resided in Mexico. *Martell*, 615 S.W.3d at 272-73. Martell also argued that the "[t]he uncontroverted evidence adduced shows that no attempt was ever made to contact Martell in person at his last known residence address or last known place of employment by any supervision officer, peace officer, or any other officer . . . ." *Id.* at 273. Thus, the trial court erred in revoking his community supervision because he proved that the State failed to exhibit due diligence. *Id.* The State asked for the trial court to be affirmed and that the appellate court create a judicial exclusion to the statutory in-person contact requirement of article 42A.109 due to the facts and circumstances of the case. *Id.*

In considering all arguments submitted by brief and fleshed out during oral arguments, the Eighth Court of Appels ruled that the trial court committed error in finding that Martell was not entitled to the affirmative defense of due diligence. In reaching this conclusion, the Court of Appeals held that the courts had no power to legislate, disregard statutory provisions, or create exceptions to statutes. *Id.* at 275. Consequently, the Court of Appeals ruled that the trial court abused its discretion when it proceeded to an adjudication of guilt based on evidence that was both legally and factually insufficient. *Id.* at 276.

SUMMARY OF THE ARGUMENT

The Eighth Court of Appeals correctly ruled that the trial court committed error when the trial judge found that Martell was not entitled to the affirmative defense of due diligence. The Court of Appeals expressly rejected the State's argument that due to the particular circumstances of the case, it should create and apply a judicial exception to the legislatively mandated in-person contact requirement of article 42A.109.

The underlying rationale for the requested exception was that it would have been legally and factually impossible, and therefore futile, to require in-person contact. No other argument was advanced by the State at the trial court level; therefore the trial court could not have based its denial of Martell's due diligence defense and his subsequent adjudication on any other theory. Likewise, the State never presented any other argument at the Eighth Court of Appeals.

The State now seeks to advance the notion that it has always argued a second ground for the trial court's rejection: namely the equitable theory of estoppel. Regardless of whether or not the State actually argued it, the Court of Appeals was not bound to consider it in its opinion because it is not an applicable legal theory to the trial court's determination of whether Appellant's due diligence defense applied. Moreover, upholding the trial court on this alternative ground would work a manifest

injustice to Appellant because fair consideration depends on a factual predicate that Appellant "was never fairly called upon to adduce" in the trial court.

ARGUMENTS

REPLY TO STATE'S GROUND FOR REVIEW: The Court of Appeals had no need to consider the theory of estoppel because it was not an applicable legal theory to the trial court's ruling on Appellant's due diligence defense. Moreover, consideration of the theory of estoppel at this stage of the proceeding would work a manifest injustice against Appellant because he did not have an adequate opportunity to develop a complete factual record with regard to that theory.

1. Standard of Review

The court of appeals is obligated to hand down a written opinion that "addresses every issue raised and necessary to final disposition of the appeal." Tex. R. App. P. 47.1; *see Office of Pub. Util. Counsel v. Pub. Util. Comm'n*, 878 S.W.2d 598, 599–600 (Tex. Crim. App. 1994). When an opinion fails to address even an alternative argument in an appellee's brief, the proper remedy is to vacate and remand the case to the court of appeals to consider the neglected argument. *Kombudo v. State*, 171 S.W.3d 888, 889 (Tex. Crim. App. 2005) (citing *Light v. State*, 15 S.W.3d 104, 108 (Tex. Crim. App. 2000) (*per curiam*)).

Regardless of whether the issue is raised to the intermediate appellate court, a trial court's decision will be upheld if it is correct on any theory of law applicable to the case. *Calloway v. State*, 743 S.W.2d 645 (Tex. Crim. App. 1988); *State v. Castanedanieto*, 607 S.W.3d 315, 327 (Tex. Crim. App. 2020); *Martinez v. State*, 74 S.W.3d 19, 21 (Tex. Crim. App. 2002) ("[I]f the trial court's decision is correct based upon any applicable theory of law, then it will be sustained on appeal.").

This principle usually applies in equal measure regardless of whether the defendant or the State is the appellee. *State v. Esparza*, 413 S.W.3d 81, 89 (Tex. Crim. App. 2013). The failure of the prevailing party in the trial court to make an argument in its reply brief in the intermediate appellate court will also not prevent the Court of Criminal Appeals from consideration of that argument when raised for the first time in a petition for discretionary review. *Volosen v. State*, 227 S.W.3d 77, 80 (Tex. Crim. App. 2007); *Rhodes v. State*, 240 S.W.3d 882, 886 n.9 (Tex. Crim. App. 2007).

While a legal theory can support a trial court's ruling even if not explicitly raised or relied upon, the theory must in some basic way be "a theory of law applicable to the case." A "theory of law" is applicable to the case if the theory was presented at trial in such a manner that the appellant was fairly called upon to present evidence on the issue. *State v. Copeland*, 501 S.W.3d 610, 613 (Tex. Crim. App. 2016).

Moreover, the applicable legal theories in a case are limited to those that will not "work[] a manifest injustice." *State v. Esparza*, 413 S.W.3d at 90. A legal theory is also not applicable to the case if the appealing party did not have an adequate opportunity to develop a complete factual record with respect to the theory. *Castanedanieto*, 607 S.W.3d at 327 (citing *Esparza*, 413 S.W.3d at 90).

2. Because the theory of estoppel is not an applicable theory of law, the court of appeals had no need to consider it.

As a preliminary matter, Appellant acknowledges that if the theory of estoppel was an applicable legal theory, then the court of appeals should have addressed it in its final disposition of the appeal, regardless of whether the argument was raised by the State's brief at the court of appeals. *Castanedanieto*, 607 S.W.3d at 327. If that is the case then vacating and remanding to the court of appeals is the appropriate remedy. *Light*, 15 S.W.3d at 105. However, the theory of estoppel is not an applicable legal theory and therefore the court of appeals had no need to consider it in its disposition of the appeal.

a. The theory of estoppel is not an applicable legal theory because it was not argued at the trial court level and the trial court did not rely on it for its ruling.

A "theory of law" is applicable to the case if the theory was presented at trial in such a manner that the appellant was fairly called upon to present evidence on the issue. *Copeland*, 501 S.W.3d at 613. "[T]he only question is whether that theory of law was litigated at the trial-court level." *Id.* The State maintains that it argued the theory of estoppel at every level of the proceedings, including the trial court level. However, a review of the record makes it abundantly clear that that is simply not the case. The trial court never had an opportunity to consider the theory of estoppel because the State never argued that theory at any of the many hearings

that occurred both prior to adjudication and after. As the State concedes in its brief, the term "estoppel" was never uttered by not just the prosecutors, but by any other party present, including defense counsel and the trial judge. Prosecutors arguing at the motion to adjudicate focused on the futility of in-person contact due to the perceived jurisdictional barriers. This is clear from the record of the prosecutors' arguments at those proceedings:

> [The Prosecutor]: However, Judge, the issue that we have in this case is the defendant resided in Mexico at the time. The adult probation officer and El Paso Sheriff's Office had no jurisdiction in Mexico. They can't go into Mexico to try to execute any kind of warrant. (RR3: 23)
> …
> [The Prosecutor]: The issue is that we don't have jurisdiction in a foreign country. (RR3: 23).
> …
> [The Prosecutor]: So, Judge, the issue that we have here is the authorities that would be able to execute the capias once it was issued do not have jurisdiction anywhere where the defendant was believed to be. (RR3: 25).
> …
> [The Prosecutor]: Judge, again, the problem that we have here is that this defendant was residing in a foreign country. He should not get the benefit of fleeing to a foreign jurisdiction[.] (RR3: 29).
> …
> [The Prosecutor]: And, again, we don't have jurisdiction over there, Judge. We cannot just walk into Mexico and try to find him. (RR3: 30).

To argue otherwise would be to credit the prosecutors with making two arguments with the same exact set of sentences. Tellingly, in their responses at the trial court hearings, defense counsel also never addressed a theory of estoppel,

instead focusing on the plain language of the statute and whether futility excused nonperformance. (RR3: 26-28, 30-32).

Likewise, the trial court clearly did not hear an estoppel argument. In summarizing her understanding of the arguments at the adjudication hearing, the trial court judge focused on the perceived legal futility of the task. She stated:

> THE COURT: Okay. I'm going to go ahead and read the case that's been cited by both sides, *Garcia v. State*, and then I will make my decision. And if you want to submit something, you can. But I do think that this case is different because I don't think there would be any way where we could execute a warrant or have a probation officer go over there and try to reassert contact. So if you have anything else for me to consider -- because I know what you're saying the law is, but I think that -- I think that if it was not possible legally to do it, I don't know how I could say that that gives the department a break and he doesn't have to comply with any of the conditions because he chooses to live in a foreign country. (RR3: 34-35).

At a subsequent hearing to issue its ruling and consider punishment evidence, the trial court gave its explanation for its ruling, stating that:

> the fact that Mr. Martell had been given permission to reside in Mexico, [I don't feel that it is] in the interest of justice to allow him to use that also as a reason to bring up the due diligence was not done like it would have been done if he had been residing here in El Paso County.

(RR4: 5).

At a third hearing, the sentencing hearing following adjudication to regular probation, the trial court addressed the State's request to prohibit Martell from residing in Mexico during his new probation term. In agreeing with the State to not allow Martell to reside in Mexico again, the trial court explained that:

> THE COURT: And I think that's a reasonable request on the part of the State especially considering that one of the arguments that was made by the defense was that due diligence was not done when the probation department cannot go into a foreign county to check where he was living or anything. So, Mr. Martell, you have to be here in El Paso County. You cannot leave El Paso County for any reason without written permission from the Court. (R5: 10-11).

Considered collectively, the trial court judge's statements clearly show she based her decision on the perceived futility of the State's ability to make in-person contact with Martell. This argument was addressed by the Eighth Court of Appeals and is not on review in this petition. No other theory, including the theory of estoppel, was litigated at the trial court level. Because the theory of estoppel was not litigated at the trial court level, it was not an applicable theory of law.

b. Consideration of the theory of estoppel at this stage of the proceeding would work a manifest injustice against Appellant because he did not have an adequate opportunity to develop a complete factual record with regard to that theory.

The applicable legal theories in a case are limited to those that will not "work[] a manifest injustice." *Esparza*, 413 S.W.3d at 90. A legal theory is also not applicable to the case if the appealing party did not have an adequate opportunity to develop a complete factual record with respect to the theory. *Castanedanieto*, 607 S.W.3d at 327 (citing *Esparza*, 413 S.W.3d at 90). Appellants and appellees alike can both be deprived of just such an opportunity,

"and this is so regardless of whether the appellee was the defendant or the State at the trial court level." *Esparza*, 413 S.W.3d at 90.

Esparza is illustrative of this proposition. In *Esparza*, the trial court granted the defendant's motion to suppress breath-test results after a contested hearing. *Id.* at 82. The trial court reasoned that the State has the burden of proving the circumstances under which the breath-test results were obtained and failed to meet this burden. *Id.* The State appealed and the court of appeals reversed the trial court's ruling, finding that the trial court had improperly shifted the burden of proof to the State. *Id.*

Relevant here, the defendant had also argued for the first time that the trial court's ruling could be upheld on the alternative theory that the State failed to establish the scientific reliability of the blood-test results under Rule 702 of the Rules of Evidence. *Id.* at 84-85. On petition for discretionary review, the Court of Appeals determined that application of this alternative theory to uphold the trial court ruling would turn upon the production of predicate facts by the appellant that the appellant was never fairly called upon to produce in the trial court, thus working a manifest injustice. *Id.* at 89-90. To avoid this, this Court held that the alternative ground was not a theory of law applicable to the case and thus could not be used to uphold the trial court ruling. *Id.* at 90.

Specifically, the Court noted that the alternative theory was never raised at the trial court either through written submission or argument. *Id.* at 87-88 ("[N]othing happened at the trial court level to alert the State that the scientific reliability of the breath-test evidence, as a function of Rule 702, was in play at the hearing on the pretrial motion to suppress evidence."). The trial court's ruling also did not address the alternative ruling. *Id.* at 84, 88 (observing that that the reason the trial court granted the motion to suppress was "apparent" and "expressly" not based on the alternative theory). Finally, the Court still affirmed the judgment of the appellate court even though it was the burden of the appellant, the State, to establish the scientific reliability because the appellee had the initial burden of raising the reliability issue. *Id.* at 89-90.

Similarly here, as described in the previous section, the theory of estoppel was neither advanced by the trial prosecutors nor taken into consideration by the trial court in its ruling. Both the prosecutors and the trial court focused on the perceived futility of meeting the statutory duty given the specific facts and circumstances of the case, to the exclusion of any other alternative theory. Because this was the sole ground argued at the trial court, Appellant was not put on proper notice that he would also have to argue that even though the statutory duty was not met, he might still be estopped from asserting due diligence was not done.

Moreover, any burden to present evidence regarding whether estoppel applies should be borne by the State. Unlike *Esparza*, here Appellant met his initial burden that the affirmative defense of due diligence was not carried out according to the statute, so the burden to proving that estoppel applied would have shifted to the State, as the proponent of that theory, to prove that Appellant should be estopped from claiming such a defense. At the adjudication hearing, there was no record or transcript introduced of either the plea hearing or plea negotiations to determine if Appellant's permission to reside in Mexico was explicitly bargained for, or simply the residence where he lived at the time, such that any other probationer would have received the same "benefit". As this Court noted in *Esparza*, any absence in the record with respect to the determining the issue, must be weighed against the party that holds the burden of proof. *Esparza*, 413 S.W.3d at 88 ("The trial court had no discretion to rule against the [the appellant] for failing to satisfy a burden of production and persuasion that should rightfully have fallen upon the appellee.").

Because the State did not argue the theory of estoppel at the trial court and did not present evidence to support its application, Appellant was not put on notice to defend against it. Relevant evidence that Appellant could have presented in rebuttal of the application of estoppel at the adjudication include law enforcement and probation department policies regarding foreign probationers at the time

Appellant originally plead. Appellant would have also sought the testimony of the probation officer who had been assigned at the relevant time, rather than just cross examining the current officer based on the historical file. Appellant himself could have testified as to whether his permission to reside in Mexico was a product of plea negotiations with the State, a request to the trial court when it was determining conditions, or simply a recognition that he resided in Mexico. Because Appellant was not given sufficient notice that these were relevant facts, upholding the trial court on this theory would "work a manifest injustice."

c. The theory of estoppel is not an applicable legal theory because it does not apply to the facts and circumstances of this case.[3]

Estoppel is a flexible doctrine that takes many forms. *Deen v. State*, 509 S.W.3d 345, 348-49 (Tex. Crim. App. 2017); *Rhodes*, 240 S.W.3d at 891. In *Rhodes*, this court recognized two common forms of estoppel: 1) estoppel by contract and estoppel by judgment. *Rhodes*, 240 S.W.3d at 891. Estoppel by contract means that "a party who accepts benefits under a contract is estopped from

[3] It is unclear if the substantive part of the State's argument—whether their theory of estoppel applies under the facts of the case--is clearly before this Court on discretionary review. This Court has indicated that it will construe grounds for review broadly and has previously gone beyond the scope of the grant of review to reverse a court of appeals for failing to uphold the trial court's ruling on a theory of law applicable to the case although not actually relied upon by the trial court. *See, e.g.*, *Malone v. State*, 253 S.W.3d 253, 256, 258 (Tex. Crim. App. 2008); *Thai Ngoc Nguyen v. State*, 292 S.W.3d 671, 676 (Tex. Crim. App. 2009); *Armendariz v. State*, 123 S.W.3d 401, 405 (Tex. Crim. App. 2003). Appellant includes this substantive argument in an abundance of caution.

questioning the contract's existence, validity, or effect." *Id.* Estoppel by judgment is a form of estoppel whereby a person "who accepts the benefits of a judgment, decree, or judicial order is estopped from denying the validity or propriety thereof, or of any part thereof, on any grounds; nor can he or she reject its burdensome consequences." *Id.* A key factor to this consideration is whether a person accepted the benefits of the judgment voluntarily. *Gutierrez v. State*, 380 S.W.3d 167, 178 (Tex. Crim. App. 2012).

The State in its brief argues that both forms of estoppel apply in this situation because Martell voluntarily accepted the benefits of "the trial court's terms and conditions of community supervision granting Martell's request to reside and work in Mexico" and that "Martell accepted the benefits of the community-supervision contract with the trial court." (The State's Brief on Pet. for Discretionary Review, 23 n.4) ("State's Brief"). However neither of these two forms of estoppel apply here against Appellant. Appellant has never questioned the contract's existence, validity or effect, and, likewise, he has never denied the validity of the court order placing him on community supervision or otherwise rejected any burdensome consequences. Indeed, it is the State which is doing that. The State is in effect attempting to apply these principles of estoppel in reverse. So if estoppel does apply, it should instead apply against the State raising this argument here.

(1) Estoppel by contract does not apply

In specific regards to estoppel by contract, there are actually two contracts at play with these specific facts and circumstances. The first is the contract between the State and Appellant in the form of the original plea bargain. The second is the contract between Appellant and the trial court related to his community supervision.

First, the plea bargain. A plea bargain is a contract between the State and the defendant into which both parties have knowingly and voluntarily entered. *See Thomas v. State*, 516 S.W.3d 498, 501-02 (Tex. Crim. App. 2017) (citing *Moore v. State*, 295 S.W.3d 329, 331 (Tex. Crim. App. 2009)). The agreement "may contain a variety of stipulations and assurances, depending on the desires of the State and the defendant." *State v. Moore*, 240 S.W.3d 248, 250 (Tex. Crim. App. 2007). Both parties are given great latitude in formulating an acceptable plea agreement. *Id.* at 251, 254. Once the trial court accepts the plea agreement, both the defendant and the prosecutor are bound to uphold their end of the agreement and are entitled to the benefit of their bargain. *See Moore*, 240 S.W.3d at 251*; see also Ex parte De Leon*, 400 S.W.3d 83, 89 (Tex. Crim. App. 2013). Moreover, once a trial court approves a plea agreement, the court is "legally bound to carry out the terms of the agreement" and is "without any authority or power to do [anything] other than

specifically enforce the agreement." *Perkins v. Court of Appeals for Third Supreme Judicial Dist. of Tex., at Austin*, 738 S.W.2d 276, 283 (Tex. Crim. App. 1987).

Thus, a trial court has a "ministerial, mandatory, and non-discretionary duty" to enforce the plea bargain it approves. *Id.* at 284-285; Accordingly, a trial court commits error if it attempts to unilaterally add an un-negotiated term to a plea bargain agreement, or if it attempts to otherwise alter the agreement's terms. *Moore*, 295 S.W.3d at 332. Where a plea agreement is silent or there is no evidence of a waiver, a defendant retains his statutory rights while on probation. *See, e.g.*, *Ex parte Williams*, 758 S.W.2d 785, 786 (Tex. Crim. App. 1988) (*en banc*) ("A party to an agreement has no contractual rights to demand specific performance over terms not appearing in the agreement or record."); *see also State v. Weems*, No. 05-02-00239-CR, 2002 WL 1551904 (Tex. App.--Dallas July 16, 2002, no pet.) (not designated for publication) (where parties' plea agreement did not contain any provisions indicating that the defendant was waiving his right to either seek or receive shock probation, the defendant retained the right to move for shock probation and the State therefore could not conclude that the defendant violated the agreement by his motion).

The State always has the power during plea negotiations to require specific terms and conditions be accepted by the defendant in order to receive a specific sentence recommendation, in this case deferred adjudication of his sentence. By

now asking that the trial court be upheld on the principle of estoppel by contract, the State is in effect asking that the trial court be allowed to add an additional term to the original plea agreement: namely the waiver of Appellant's right to raise the due diligence defense. Any silence in the record regarding such a waiver means Appellant retained the right to benefit from any defense, statutory or common-law, at a possible adjudication hearing. Estopping Appellant from now asserting such a defense would be depriving him of the benefits of his plea bargain.

As to the other possible contract in play, the community supervision, the principle of estoppel clearly does not apply. The terms and conditions of community supervision, as this Court has recognized, are in effect a contractual agreement between the trial court and the defendant. *Dansby v. State*, 448 S.W.3d 441, 447 (Tex. Crim. App. 2014). Apart from the plea agreement, what those exact conditions will be is not a product of negotiation; a defendant must simply take them or leave them if he wants to avoid incarceration. *Gutierrez*, 380 S.W.3d at 179 ("A defendant ordinarily has no say in the trial court's decision regarding the appropriate conditions of community supervision."). Conditions not objected to are affirmatively accepted by the defendant as terms of the contract. *Dansby*, 448 S.W.3d at 447. By entering into the contractual relationship without objection, a defendant affirmatively waives any rights encroached upon by the terms of the contract. *Id.*

This form of estoppel by contract has always been applied in situations where the defendant is complaining in a later appeal about the terms and conditions assessed against him by the trial court. A review of the case law did not come up with any situation akin to what we have here: where the State is complaining that the terms and conditions assessed against the defendant did not contain enough foresight to preclude the defendant from asserting his legal defenses. Again, whether the ramifications of Appellant being allowed to reside in Mexico were specifically contemplated by the trial court or simply a result of where Appellant resided at the time, is unknown. Whether the State objected or agreed to the condition at the plea is unknown. There were no records of either adduced at any of the many hearings surrounding Appellant's adjudication as to that fact. As the proponent of the theory, these absences must be held against the State.

(2) Estoppel by judgment does not apply

Turning to the second type of estoppel contemplated by *Rhodes* and *Deen*, "the focus of estoppel by judgment is the acceptance of a benefit rather than an agreement contemporaneous with the judgment." *Deen*, 509 S.W.3d at 349. "[A] party who accepts the benefit of a judgment that imposes an illegally lenient sentence is estopped from challenging the judgment at a later time." *Id.* (citing *Murray v. State*, 302 S.W.3d 874, 882 (Tex. Crim. App. 2009). The State argues that the "benefit" Appellant voluntarily accepted, permission to reside and work in

Mexico, created a "jurisdictional inability of any local officer to physically go to Martell's authorized place of residence or work to attempt in-person contact with him once he (Martell) stopped reporting to his probation officer." (State's Brief, 14-15).

First, as has been repeatedly stated, the record is silent as to whether Appellant requested special permission to reside in Mexico or whether he received the same consideration any other probationer in his situation would, namely to reside and at his current place at the time of the judgment. If the latter, then Appellant did not receive a special legal benefit or more favorable treatment as contemplated by the estoppel case law. And second, unlike *Colone v. State*, 573 S.W.3d 249 (Tex. Crim. App. 2019) and *Prystash v. State*, 3 S.W.3d 522, 531 (Tex. Crim. App. 1999), this isn't a case of invited error or forfeiture by wrongdoing. There was no error in the trial court's initial pronouncement of community supervision terms, induced or otherwise, and Appellant certainly did not mislead the trial court in any way. In fact, at the time Appellant was initially placed on probation, the statutory defense didn't even exist. The common-law defense, more onerous against the State, was still in place. If at the time of judgment the State believed the probation department and law enforcement would have difficulty meeting their duty in any respect, statutory or common law, then they could have requested or objected on the record to the trial court about any

terms and conditions applied. In fact, the State did this very thing when Appellant was adjudicated to straight probation.[4] The State's last-minute attempt to shoe-horn in a theory of estoppel by judgment is therefore inapplicable.

CONCLUSION

The Eighth Court of Appeals correctly ruled that the trial court committed error when the trial judge found that Appellant was not entitled to the affirmative defense of due diligence. The Court of Appeals expressly rejected the State's argument that due to the particular circumstances of the case, it should create and apply a judicial exception to the legislatively mandated in-person contact requirement of article 42A.109.

The Court of Appeals had no need to consider the theory of estoppel because it was not an applicable legal theory to the trial court's ruling on Appellant's due diligence defense. Moreover, consideration of the theory of estoppel at this stage of the proceeding would work a manifest injustice against Appellant because he did

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[4] [The Prosecutor]: As Your Honor recalls, this defendant was previously permitted to reside in Mexico, and part of the defense that was alleged was the due diligence after he fled to Mexico and didn't come back, I think it was almost ten years. The State would ask that given that he's been given this opportunity to be on probation, that he not be permitted to reside in Mexico. That he have to reside here in El Paso County for the length of his probation.
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not have an adequate opportunity to develop a complete factual record with regard to that theory.

For these reasons, Appellee's sole ground accepted for review should be overruled, and the judgment of the Eighth Court of Appeals should be affirmed.

PRAYER FOR RELIEF

Mr. Martell prays that this Court overrule the State's sole ground presented for review and affirm the judgment of the Eighth Court of Appeals.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief for the Appellant was sent by e-mail using the E-serve system to the following: State Prosecuting Attorney at information@SPA.texas.gov; Tom Darnold at tdarnold@epcounty.com, the District Attorney's Office, 500 E. San Antonio Room 201, El Paso, Texas 79901 and mailed to the Appellant Mario Martell on this the 10th day of May, 2021.

BY***:/s/ Octavio A Dominguez***
OCTAVIO A DOMINGUEZ

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing document, beginning with the statement of facts on page 1 through and including the prayer for relief on page 28, including footnotes, contains 6,836 words, as indicated by the word-count function of the computer program used to prepare it.

BY***:/s/ Octavio A Dominguez***
OCTAVIO A DOMINGUEZ

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